

**OPINION
76-38**

July 2, 1976 (OPINION)

Harold G. Vavra, Director

Aeronautics Commission

Box "U"

Bismarck, ND 58505

Dear Mr. Vavra:

This is in response to your request for an opinion with regard to a prospective joint county/city airport.

You indicate that the city (county seat of the county involved) through the City Airport Authority has determined that the benefits derived from operation of the airport are about 50 percent city and 50 percent county (outside of the county seat city). You indicate that the City Municipal Airport Authority has requested county financial assistance to help pay for costly improvements which are badly needed. You indicate that the county does not own or operate any airports in the county.

Your questions are generally as follow:

1. May the County Commissioners levy a 2 mill tax levy for the purpose of providing financial support to the City Airport, provided that the levy is so made as to not apply to property within the city (which is already subject to a 4 mill city airport levy), and further provided that the City Airport Authority enter into an agreement or contract for the expenditure of county airport funds created by a 2 mill county levy.
2. You ask further, insofar as the county has a deadline to finalize its budget and tax levies, may the County Commissioners budget and levy the 2 mill tax for airport purposes immediately and formulate an agreement or contract later, but before the tax moneys become available.
3. You ask further whether the agreement or contract for the expenditure of the proceeds of the 2 mill county levy be made between the county and the City Airport Authority, or should the agreement be made between the county and the city.

There is no question that a county may maintain and operate a county airport, and that the governing board may determine to do so at any time, though obviously, of course, the county officials would necessarily have to follow the usual procedural statutes with regard to appropriating funds for levying appropriate taxes, etc. for the project. Section 2-02-01 of the North Dakota Century Code provides in this respect and insofar as here applicable:

"2-02-01. AUTHORITY TO ACQUIRE, OPERATE AND REGULATE AIRPORTS. - * * * all counties, cities, * * * of this state, separately or jointly, may acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft either within or without the geographic limits of such political subdivisions and may use for such purpose or purposes any available property owned or controlled by * * * * * such political subdivisions. Any property acquired, owned, leased, controlled, or occupied for the purpose or purposes enumerated herein hereby is declared to be acquired, owned, leased, controlled, or occupied for a public purpose and as a matter of public need, and there shall be no liability on the part of the * * * county, city, * * * in connection therewith, or in the operation thereof, except to its own employees." (Emphasis and deletions by us)

As to financing same, section 2-06-15 of the North Dakota Century Code provides:

"2-06-15. COUNTY TAX LEVY FOR AIRPORT PURPOSES. - In counties supporting airports or airport authorities, a levy in addition to all other levies permitted by law, not to exceed four mills on the net taxable valuation of property in such county, may be made for such purposes, but such levy shall not apply to any city or park district that already has an airport levy."

While there may be some question as to whether a county may make a contribution to another entity's airport, there is no question under the above statutes that the county can levy taxes to and maintain its own airport, or join with a city to jointly maintain and operate a joint county/city airport.

On such basis your first question must be answered in the affirmative assuming that the county commissioners levy the 2 mill tax levy for the purpose of maintaining and operating a joint county/city airport, provided that the levy is so made as to not apply to property within the city already subject to a 4 mill city airport levy. The practicality of whether the county should operate its own airport independent of the city, or cooperate in the maintenance and operation of a joint county/city airport, is more a question of the county commissioners business judgment, upon which your department can furnish the expertise than a legal question, however, from the information at our hands at the current time, the joint county/city operation would appear the most feasible.

The essential element for the county commissioner to determine is whether the county will maintain and operate a county airport, (without regard to whether same is an independent county airport, or one operated in conjunction with the city airport). Assuming, as we do, that your expertise and the business judgment of the board of county commissioners indicates that the joint county/city operation would be the most practicable, it would, of course, be necessary that an agreement or contract between the entities involved be entered into prior to the expenditure of the funds involved.

In response to your second question, while same is perhaps not directly relevant, the basic principle is set out in Section 175 of the North Dakota Constitution, specifying that:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied."

On such basis Chapter 11-23 of the North Dakota Century Code requires a county budget, outlining the amount required to be expended for particular purposes, receipts that will be available from other sources for such objective, and the amount that will be necessary to be raised by tax levy, to make up the difference.

Thus the essential element at the current time, is for the county commissioners to determine, the amount that will be necessary, to expend for a county (either independent or joint) airport during the fiscal year, and any offsets (receipts) that will be available to lessen the amount that would have to be raised by county tax levy. Assuming that the county does determine to establish a county airport on a joint basis with the city, and that they determine the amount necessary to include in the county budget for same it would not be essential that the agreement or contract be in existence at the present time though as hereafter indicated it would, of course, be necessary that the agreement or contract be completed prior to actual expenditure of the funds involved.

In response to your third question, counties being in this respect, corporate entities, they necessarily, in the operation of the various county activities, operate through officers, employees, etc., who can do the actual work necessary. Assuming as heretofore indicated, that the airport contemplated would be a joint county/city operation, and being informed that the city airport is currently being operated by a City Airport Authority, with the appropriate officers and employees necessary to operate same, we would at least tentatively conclude that it is intended that the county operation (or share of the operation) would work through the same officers and employees as are now utilized by the City Airport Authority. We would assume that under the arrangement in existence prior to the county's determining to participate, that the city airport authority, was solely responsible to the city. In that conversion of the operation to a joint county/city operation, we assume that it would be necessary to clarify the responsibility of the officers and employees of the current city airport authority, to both county and city, and that such officers and employees of the current City Airport Authority would at least need the city's permission to also act for the county. On such basis, we would at least tentatively conclude that the paper work involved would be much simplified if the agreement or contract were made in the first instance between the governing bodies of the city and the county, rather than separate new agreements being made between the county and the preexisting officers and employees of the City Airport Authority and the city. Chapter 54-40 of the North Dakota Century Code outlines the general authority and procedure for joint exercise of governmental powers, contracts between same, etc.

We do note, that Chapter 2-06 of the North Dakota Century Code does authorize joint operations of airport authorities of more than one

governmental entity and does give the presently existent airport authority of the city very broad contractual powers. However, as it is our understanding that the city does wish to operate its share of the airport project as an "airport authority" project and does not wish to operate its share of the airport project directly through its governing body, and that the county would be interested in a "county airport", but would not necessarily be interested in a "county airport authority" project, we would assume that again the county would prefer to make the basic contract with the governing body of the city, and such further agreements with the officers and employees currently serving the city airport authority as might be appropriate.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

JOHN E. ADAMS

Assistant Attorney General